UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

June 29, 2001

Re: American Institute of Physics
Case No. 5-CA-29366

Kirsten Lea Doolittle, Esq.
Dickstein, Shapiro Morin & Oghinsky, LLP
2101 L Street, N.W.
Washington, D.C. 20036-1526

Dear Ms. Doolittle:

Your appeal from the Regional Director's refusal to issue complaint has been carefully considered.

The appeal is denied. The evidence adduced during the Regional Office investigation established a *prima facie* case that Charging Party Jeff Schmidt was discharged for engaging in protected concerted activities. Thus, the evidence indicated that Jeff Schmidt engaged in extensive protected activity for over a decade, that the Employer had knowledge that Schmidt was engaged in such activity, and that the Employer bore animus towards Schmidt for engaging in such activity. However, it was further concluded that the evidence is also sufficient to establish that the Employer met its *Wright Line* [*Wright Line*, 251 NLRB 1083 (1980)] burden of establishing that it would have discharged Mr. Schmidt for his conduct relating to his book publishing in any event notwithstanding his role in protected concerted activities. The evidence in this regard indicates that Mr. Schmidt had a non-work related book published which contained an introduction with the following words: "This book is stolen. Written in part on stolen time, that is. I felt I had no choice but to do it that way...." The Employer asserts that when it learned of this statement it immediately discharged Mr. Schmidt for failing to spend his work time on company business.

While the appeal asserts that it is common industry practice for employees such as Mr. Schmidt to engage in writing activity during work hours for publishers other then their own employer, it was concluded that it is the practices of this particular Employer and not the publishing industry as a whole that is relevant to this matter on appeal. In this regard, the evidence submitted in support of the appeal concerning the Employer's alleged tolerance of other employees doing writing work for other publishers on company time was deemed distinguishable from the facts of the case on appeal. Thus, the articles in question were written some years ago and are not reasonably contemporaneous with Mr. Schmidt's discharge. Moreover, such articles, unlike Mr. Schmidt's book, appear to have some relationship to the field of physics.

The appeal further asserts that Mr. Schmidt did not actually "steal" company time, but merely engaged in literary hyperbole in his book introduction. However, given the nature of the work involved in this matter, it was concluded that the Employer has some justification for taking Mr. Schmidt at his word rather than treating this as a mere literary device to catch the interest of a reader. Moreover, and most significantly, even if Mr. Schmidt did not actually work on his book project on company time, by asserting that he did, he served to undercut Employer efforts at enhancing employee productivity.

Thus, in view of all the above, it was concluded that the Employer met its burden under *Wright Line* of establishing that Mr. Schmidt would have been discharged for the above conduct even absent his participation in protected concerted activity.

While Employer threats of discipline and other retaliatory conduct in order to discourage employees from discussing working conditions with each other and informing the Employer of their collective concerns is conduct violative of the National Labor Relations Act, in view of all the circumstances of this matter, it was concluded that issuance of complaint regarding this particular allegation would not effectuate the purposes and policies of the Act.

Accordingly, further proceedings herein were unwarranted.

Sincerely,

Arthur F. Rosenfeld
General Counsel

By _____
Yvonne T. Dixon, Director
Office of Appeals

cc: Director, Region 5
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